INDEX.

	PAGES.
The question involved and manner in which it is raised in this Court	1
The facts in the case	3
The opinion, in full, of the Court below (with interpolated references to the record)	5
"Official report"	8
Specification of the errors relied upon	17

BRIEF OF THE ARGUMENT.

POINT I.—The Sherman Act prohibits undue limitations on competitive conditions	18
Brief review of the most recent Sherman Act cases in this court	19
POINT II.—The combination, or concerted action, of these defendants in distributing circulars stating the true position of lumbermen in the trade, was not a combination which unduly restrained competition	22–47
(a) The true question under the English and American authorities is whether the circulation of the "Official Lists" is a reasonable defensive measure or is an unreasonable, offensive and malicious means to eliminate competition	22
(b) Salient features disclosed by the record bearing upon this question—the reason for the lists being to acquaint the defendants with the names of their competitors	36
(c) Consideration of the grounds assigned by the Court below for its decision and of the arguments advanced by the Government	39
(d) Summary and argument in conclusion	45

PAGES.

POINT III.—The Question of Boycott.

(a) No combination or concert of action among defendants to boycott those whose names appeared on the "Official Reports"..... 48

(b) Discussion of the nature of boycotts and of recent authorities on that subject..... 50

POINT IV.—The evidence concerning past occurrences, if relevant at all, tends to establish that the defendants' present intent is right and law abiding 55

(a) Circumstances connected with the organization of the defendant Phila. Assn. and its subsequent activities..... 57

(b) The Eastern States' Retail Lumber Dealers Assn 59

POINT V.—These present appellants are not responsible for the actions of individuals in other local associations 60

(a) No confederation among the various local associations, except with respect to the circulation of the "Official Reports" 60

(b) Discussion of pertinent Authorities in this regard 63

POINT VI.—In Conclusion.

There were no absurdities contemplated by the Sherman Act..... 68

POINT VII.—The decree below should be reversed and the bill of the Government dismissed..... 69

List of Authorities Cited.

	Cited at Pages of Brief.
Aikens vs. Wisconsin, 195 U. S., 194	25, 46
Allan vs. Flood, Appeal Cases, 1898, 1	29, 30
Bohn Manufacturing Co. vs. Hollis, 54 Minn., 223	23, 30
Carew vs. Rutherford 106 Mass., 1, 14	32
Central Lumber Co. vs. State of South Dakota, 226 U. S., 157	68
Collins vs. American News Co. (N. Y. Supreme Court, 1901), 34 Misc., 260, 263, 265; affirmed 68 App. Div., 639	32
Continental Insurance Co. vs. Board of Fire Underwriters, &c., 67 Fed Rep., 310, 320-21	31
Cooke on Combinations, Monopolies & Labor Unions (2d ed.), Ch. V	50
Cooley on Torts (2d ed.), 328	29
Dueber Watch Case Mfg. Co. vs. Howard, &c., Co., 55 Fed. Rep., 851, 854	33
Dueber Watch Case Mfg. Co. vs. Howard, &c., Co., 66 Fed. Rep., 637, 645, 652	34
Ertz vs. Produce Exchange of Minneapolis, 79 Minn., 140, 144	30, 31
Gompers vs. Buck Stove & Range Co., 221 U. S., 418, 436	52
Grenada Lumber Co. vs. Mississippi, 217 U. S., 433, 441	53, 54
Lawlor vs. Loewe, 187 Fed. Rep., 522, 526	64
Loewe vs. Lawlor, 208 U. S., 274, 291	51, 52
Macauley Brothers vs. Tierney, 19 Rhode Island, 255, 259	31
Mills vs. United States Printing Co., 99 App. Div. (N. Y.) 605, 608-9, 610	29
Mogul Steamship Co., Ltd., Appeal Cases, 1892, 25, 36, 37, 38, 42, 52, 59	25, 28
Mogul Steamship Co., L. R., 23, Q. B., 598, 614	31, 32
Montgomery Ward Co. vs. South Dakota Retail Merchants & Hardware Dealers Ass'n, 150 Fed Rep., 413	23
Nash vs. U. S., 229 U. S., 373	19
National Protective Ass'n vs. Cuming, 170 N. Y., 315, 321, 339	28
Quinn vs. Lathem, Appeal Cases, 1901, 495, 512, 514	29
Standard Oil Co. of New Jersey *et al.* vs. The United States, 221 U. S., 1, 58, 59, 60	18, 19, 20, 22
State vs. Adams Lumber Co., 81 Neb., 392, 412-13	54, 63
Toledo A. A. & N. M. Ry. Co. vs. Pennsylvania Co., *et al.*, 54 Fed. Rep., 730, 738	35, 55
United States vs. Trans-Missouri Freight Association, 166 U. S., 290, 337	16, 18, 68
U. S. vs. Kissel, 218 U. S., 601	49
United States vs. American Tobacco Company, 221 U. S., 106, 177	19, 20, 25
United States vs. St. Louis Terminal, 224 U. S., 383, 394-95	20
United States vs. Reading Company, 226 U. S., 324, 369, 364, 348	20, 49, 50, 66
United States vs. Union Pacific Railroad Company, 226 U. S., 61, 84, 88	20
Wabash R. R Co. vs. Hannahan *et al.*, 121 Fed. Rep., 563, 569	35
Walker vs. Cronin, 107 Mass., 555, 564	31

Supreme Court of the United States.

WILLIAM C. MACBRIDE, individually and as President of the RETAIL LUMBERMEN'S ASSOCIATION OF PHILADELPHIA *et al.*,
Appellants,

against

THE UNITED STATES,
Respondent.

BRIEF FOR APPELLANTS.

Statement of the Case.

This case comes before the Supreme Court upon an appeal, taken pursuant to the Act (as amended in 1910) of February 11, 1903, Chapter 544 (32 Stat. L. 823), from a final Decree of the District Court of the United States for the Southern District of New York, entered by the four Circuit Judges for the Second Circuit, in an action brought by the United States against these appellants and a large number of other parties defendant under Section 4 of the Act of July 2, 1890, Chapter 647 (26 Stat. L. 209) entitled

"An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly called the Sherman or Anti-Trust Act. This appeal is being heard with an appeal from the same final Decree taken by the Eastern States Retail Lumber Dealers' Association and other of the defendants, all represented below by Messrs. Atwater & Cruikshank as solicitors, and which latter appeal is No. 511 on the present docket. The defendants represented in this particular appeal, No. 550, are those that were represented below by Messrs. Taylor, Jackson & Brophy as solicitors. The record is the same in both appeals. The particular papers presenting the appeal of these especial defendants will be found at pages 30 to 44 of Volume I of the Transcript of the Record. The consolidation of the records was at the instance of the United States (p. 40, fol. 98).

There is but one question, as counsel for these appellants understand the situation, which is involved in this case,—and that is the right of the defendants to continue the issuance from time to time of a circular of the character set forth in the opinion below, and the issuance of which, or of any circular of like nature, was enjoined by the Decree below, as a restraint of trade. The opinion of the Court (which was unanimous) will be found at page 1 Volume I, of the Record. It was written by Judge Lacombe. The resultant Decree appears at page 5 of Volume I of the Record. It is of this Decree that these appellants complain, insisting that the Decree should have been in their favor, dismissing the bill of the United States

as to them, and thus in effect permitting the further issuance of the circular.

These particular appellants, representing the Retail Lumber Men's Association of Philadelphia, appeared in the case below by solicitors and counsel distinct from those of all the other defendants, and have taken this appeal by their own counsel, for the sole purpose that there might be voiced in their behalf, freed from special considerations affecting some of the other defendants, the single right for which they have contended and still contend: That right is, to continue the distribution among retail lumber men of these circulars or lists that inform them of dealers who pretend to be wholesalers, but who are in fact doing a retail business as well. To use the words of the opinion, that has been "the extent of their offending"; and concerning such offending these defendants insist, that as all men have the undoubted right freely to receive information and to know the habits and customs of those with whom they deal or may deal, they have the equal right to combine into an association in order the better to acquire that knowledge.

The Court below has held with them as to the premise, but disagrees as to the logical conclusion. From such a view they respectfully appeal.

The Facts in the Case.

This record is of the usual unconscionable size that obtains in these Anti-trust cases, and an effort even to summarize the evidence would result in a brief of interminable length. These appellants submitted to

the Court below a *præcipe* which, had it been adopted, would have presented to this Court merely the pleadings, opinion and Decree below, together with the statement that "The evidence in this case is fully, fairly and correctly summarized in the opinion and decision of this Court prepared by Lacombe, Circuit Judge, and concurred in by the three other Circuit Judges" (see p. 38 of Volume I of the Record, fol. 93). To this kind of a record the Government successfully objected (p. 39, fol. 96). Nevertheless these appellants will continue to urge that substantially the only facts which need be considered by the Supreme Court upon this appeal are those set out in the opinion below. We shall give as our main statement of the facts those portions of the opinion which rehearse the evidence, together with brief references to the parts of the record where this evidence appears. If, in the brief for the Government, criticism is made of the statement of facts in the opinion of the Court below, or references are made to further evidence than what is referred to in the opinion, we shall ask the liberty of submitting a short memorandum in reply discussing any such evidence that may be brought up. We adopt this course in the hope that, so far as these appellants are concerned, the labors of Court and counsel may be materially shortened.

Opinion.*

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA, Petitioner,

vs.

THE EASTERN STATES RETAIL LUMBER DEALERS' ASSOCIATION and others, Defendants.

Before Lacombe, Coxe, Ward and Noyes, Circuit Judges.

This is an action under the Anti-Trust Act, brought by the United States against various associations and corporations composed of retail lumber dealers, who are charged with being parties to a general conspiracy and combination which it is alleged has limited competition and unlawfully obstructed the free flow of trade and commerce among the States, in lumber and lumber products.

LACOMBE, C. J.: Although the record is a long one, the concrete questions here presented lie within a narrow compass. Certain resolutions which, at one time or another, were adopted at conferences between the defendants represented by delegates, were abrogated sometime before the suit was brought. Various lists were circulated in the trade, at one time or another, known in the record as the "Yes List," the "No List," "List No. 1," "List No. 2" and "List C";

* The excerpts from the Opinion are not put in quotation marks; but our own references to the Record regarding the same are interspersed in brackets. Subject to such bracketed interpolations on our part, we are here giving the Opinion *verbatim* and *in full*.

but the circulation of such lists stopped before suit was brought and there is nothing in the record to indicate that there is any intention to resume their circulation by defendants or by any one else.

[List C, the latest, has not been sent out since June, 1908 (Vol. III, p. 480), whereas this suit was begun three years later, June, 1911. The so-called Ottawa resolution, which was the last resolution of the Eastern States Retail Lumber Dealers' Association criticised by the Government, was adopted at a meeting in Ottawa, in 1905, at which time no representative of these particular appellants was present (Vol. X, p. 237); and at any rate classifications pursuant to this Ottawa resolution, for a long time past, have not been made by any retail lumber dealers (Vol. III, p. 477, 8).]

The extensive testimony as to these earlier resolutions and lists was properly introduced as illuminative of the intent with which the continuing circulation of other lists is carried on and of the object sought to be obtained thereby.

[We call attention to our respectful criticism of the above legal conclusion, appearing in Point IV of this brief, page 55.]

The lists which are still being circulated may be called for lack of a better name, "Official Reports." Nothing else, so far as we understand it, is now or was being done at the time suit was brought, by defendants as a combination, except the circulation of these lists among the members of retail lumber dealers' associations and corporations. This seems to be the extent of their offending.

[It should be noted here that further and other

criticisms appeared in the Government's brief below, but of a number of *separate* acts of individual defendants. As a basis for these criticisms there was much testimony taken pro and con—all of which we insisted was entirely immaterial as to these appellants. The Government had joined as parties defendant in this suit, first, the Eastern States Retail Lumber Dealers' Association, a membership corporation organized under Section 130 of Chapter 559 of the Laws of 1895 of the State of New York, now (and without amendment), section 180 of the Membership Corporations Law of the State,* with a charter taken out in the latter part of the year 1902 and by-laws adopted in February, 1903 (see Vol. IV of the record, p. 31–38). This membership corporation, under Article VII of its by-laws, was composed of certain individuals delegated three at a time from each local association that wished in this manner to join the Eastern States Association. The Government also joined as parties defendant, secondly, the nine local associations who sent delegates from time to time to the meetings of the Eastern States Association, to-wit: the New York Lumber Trade Association, New Jersey Lumbermen's Protective Association, Building Material Men's Association of Westchester County, Retail Lumbermen's Association

* "§ 180. Certificate of Incorporation.—Five or more persons may form a corporation commonly called a board of trade or exchange, or a building exchange or association, for the purpose of fostering trade and commerce, or the interests of those having a common trade, business, financial or professional interest, to reform abuses relative thereto, to secure freedom from unjust or unlawful exactions, to diffuse accurate and reliable information as to the standing of merchants and other matters, to procure uniformity and certainty in the customs and usages of trade and commerce, and of those having a common trade, business, financial or professional interest; to settle differences between its members, and to promote a more enlarged and friendly intercourse between business men, by making, acknowledging and filing a certificate, stating the particular object for which the corporation is to be created; the name of the proposed corporation; the town, village or city in which its principal office is to be situated; the number of its directors, not less than five; the names and places of residence of the persons to be its directors, until its first annual meeting; and the times for holding its annual meetings.

Such certificate shall not be filed without the approval, indorsed thereupon, or annexed thereto, of a Justice of the Supreme Court.

On filing such certificate, in pursuance of law, the signers thereof, their associates and successors, shall be a corporation in accordance with the provisions of such certificate.

of Philadelphia, The Lumber Dealers' Association of Connecticut, The Massachusetts Retail Lumber Dealers' Association, The Lumber Dealers' Association of Rhode Island, The Lumber Exchange of the District of Columbia, and The Retail Lumbermen's Association of Baltimore, Maryland. Some of these local associations were membership corporations, while others, like the Philadelphia Association, were not incorporated at all. In both instances the Government also, and thirdly, joined as parties defendant in the case numerous individual retail lumber dealers, who were prominent members of the particular associations, and usually officers therein. We insisted below that the questions germane to this litigation were the actions of the Eastern States Retail Lumber Dealers' Association and, so far as these Philadelphia appellants were concerned, the actions of the Retail Lumbermen's Association of Philadelphia; and that instances of isolated conduct on the part of certain individual defendants beyond the scope of the by-laws of either of these two associations, and without the knowledge or acquiescence of these defendants, were not relevant. It seems that the Court below took this view, but we shall discuss it further in Point V of our brief, p. 60. We insist that the Court's conclusion is absolutely accurate that "Nothing else * * * was being done at the time suit was brought, by defendants *as a combination*, except the circulation of these lists."]

Each of these Official Reports reads as follows:

OFFICIAL REPORT.

(Name of the Particular Association Circulating it).

Statement to Members (with the date).

"You are reminded that it is because you are members of our Association and have an interest in common

with your fellow members in the information contained in this statement, that they communicate it to you ; and that they communicate it to you in strictest confidence and with the understanding that you are to receive it and treat it in the same way.

"The following are reported as having solicited, quoted, or as having sold direct to the consumers :

(Here follows a list of the names and addresses of various wholesale dealers).

"Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same, and in so doing should, if possible, supply the following information :

"The number and initials of car.

The name of consumer to whom the car is consigned.

The initials or name of shipper.

The date of arrival of car.

The place of delivery.

The point of origin."

[The sample of the official lists distributed by the Retail Lumbermen's Association of Philadelphia will be found at Vol. IV, p. 371 of the record. It was of a form identical with that of the list distributed by each of the other local associations, barring the difference in name.]

A brief statement of the condition of the lumber business will make plain the bearing of this circular.

The trade for a long time has been naturally divided into separate groups.

1. The manufacturer or mill man usually turns the

standing timber or the felled trees into one or more kinds of rough lumber. He sells either directly to the retail yard dealer, or to the wholesale dealer or to large consumers using large quantities of one kind of lumber.

2. The wholesale dealers are usually located at or near the large markets such as New York, Chicago, etc. In some cases the wholesale dealer maintains a yard, but usually he does not do so, acting as middleman to transmit orders from his customer to the millman, who fills the order direct to the customer. A very large part of the wholesaler's business is the selling of large lots (carload or schooner-load shipments) to the retail dealer. There are some wholesalers who make it a rule to sell and ship only to retail yards; others sell only to large consumers; others sell to both classes. The brief for the Government contains this statement, which seems to be supported by the record: "It has been the custom for nearly all manufacturers, millmen and wholesalers of good standing to protect the retail yard dealer in any city by refusing to sell to a consumer who is a customer of the retail yard dealer to whom such manufacturer or wholesaler sold lumber. But there is and always has been a large class of reputable manufacturers and wholesale dealers who sell lumber to large consumers in any city where such manufacturers and wholesalers have no customers among retail yard dealers or where the large consumer is not a customer of any yard at retail prices."

3. The retail dealers are located in nearly every town and city in the New England and Middle States. They

have yards in which they store lumber bought from the wholesaler or the millman. From his yard the retailer supplies the local demand for building or manufacturing purposes. In some places the retailer also delivers lumber to the consumer directly from schooners or cars, without first placing in his yard, where the order is for a large quantity.

4. The consumers are divided into several groups :

(*a*) The contracting builder of houses, bridges, wharves, and who also does repair and construction work of all kinds.

(*b*) The converter or manufacturer, who converts the sawed lumber into furniture and "trim," such as mouldings, frames, sash, doors and blinds, and in some cases into boxes and containers.

(*c*) The United States Government and, in some localities, municipalities and railroads.

(*d*) The small consumer of lumber for small building, repair and construction work.

(*e*) Large factories and manufacturing establishments using lumber in large quantities for special purposes.

The retail dealer has to carry many different kinds of lumber in stock in his yard to make prompt delivery of what may be called for. The natural customer of the retailer is the local contracting builder who requires either a large number of items in small lots or particular items for immediate delivery. He also secures some

of the trade of other consumers, such as large contracting builders of railroads, docks, etc., and factories of all sorts.

[It is not with a desire to criticize this statement of the natural divisions of the lumber trade, that we call particular attention in this connection to the fact that the nomenclature of wholesaler and retailer ought not to convey to this Court the same impression that it would, for instance, in relation to a dry goods business. In the latter the large jobber's establishment, dealing with the smaller house that sells to the consumer, is regarded by common consent as the wholesaler, and the smaller house, which dispenses its wares to the passing customer, is considered the retailer. The wholesaler and retailer in the lumber trade occupy quite different places. In the lumber business the wholesaler, as such, is nothing but a broker or commission man (see Vol. X, pp. 227, 257, 275–277). Like many brokers he may occasionally buy and resell, making his profit in that way instead of through a commission. But the wholesaler, as such, is a man who does not handle the goods himself;—who often, as the testimony colloquially expressed it, does business in his hat ;—and who, of course, is without the consequent operating expense that is fastened upon the acknowledged "retailer." The acknowledged —and reputed—retailer becomes such and is distinguished from the wholesaler ordinarily because he has the additional and necessary expense of a lumber yard (see Vol. X, pp. 229, 230, 265, 266, 275–277). When a lumber dealer doing a brokerage business has also a yard, he becomes, in the eye of the general trade, both a wholesaler and retailer—at least in the localities where his yard is situated. Instances appear in the record of wholesalers who thus openly do a retailer's business as well.

The above is of some importance, because it is the contention of these appellants (see Point II of the Brief, at p. 38) that the so-called official

lists mean to indicate to the members of the local associations just what they say upon their face; namely, to tell them about dealers who, by reason of the fact that they have no yard, have been regarded as wholesalers (and not competitors), that they are, on account of the class of customers to whom they are discovered selling lumber, to be regarded as retailers (and competitors) as well—to the end that every other retailer will understand the true situation accordingly in deciding whether to buy from them, just as he would in deciding whether to buy from some fellow—but acknowledged—retailer.]

For a number of years there has been friction between the two groups, wholesalers and retailers. Wholesalers have complained because some retail dealers have not been content with selling in small lots for local delivery but have negotiated sales of large lots from millmen to consumer. Retailers have complained because some wholesalers having discovered a retail dealer's local customers have themselves sold to such local customers in competition with the retailer. We need not go into the details of this controversy which are spread out at great length in the record. Suffice it is to say that the "Official Report" is a method adopted by the retailers to check this competition. Retail dealers, who are members of one or the other of these associations defendant, are not required by their associations to refrain from dealing with any wholesalers whose names are on the list. There is no fine or penalty for dealing with them; nor is the retailer disciplined in any way if he does deal with them. But the record indicates that no such discipline is nec-

essary. A retail dealer who learns that some wholesaler has taken away customers from another retail dealer will not be likely to buy from him, lest learning the names of his own customers the wholesaler might compete with himself to get their trade. In the brief filed for one of the defendants there is a frank and concise summary of the situation.

"Ordinarily speaking, and other things being equal, a retailer would not buy his own source of supply from people on these lists, and wholesalers would object strongly to getting on these lists, because if they were found out at the business of selling retailers' customers, they knew a retailer would be shy of buying from them."

To a greater or less extent therefore the circulation of these "Official Reports" operates to prevent some wholesaler's, who otherwise would enter into competition with retailers in supplying consumers, from undertaking so to compete. That the reports are prepared and circulated to accomplish that very object is manifest.

[The concrete facts set forth in this portion of the opinion are correct, but we respectfully dispute the conclusions that the lists are "a method adopted by the retailers to check this competition," and that they operate "to prevent some wholesalers, who otherwise would enter into competition with retailers in supplying consumers, from undertaking so to compete," and that they are "prepared and circulated to accomplish that very object." These are matters which we shall discuss with care and fully in Point II of the brief. The record, certainly so far as these particular Philadelphia appellants are concerned, bears out without qualification the facts set

forth in the opinion of the Court, that there is no fine or penalty for dealings on the part of members of the retailers associations with anyone on the lists (Vol. X, pp. 233, 258, 272, 274, 279–82), and that *there is absolutely no agreement, combination or concert of action, as to whether the retailers who are members of the Association, will or will not deal with people on the lists. The above cited testimony of the witnesses from the Philadelphia Association is entirely uncontradicted upon this point.*]

[The balance of the opinion below contains the reasoning and conclusions of the Court. To the end that the opinion may be given completely in this brief, we here subjoin all that follows.]

No doubt every retail dealer has a right to choose from whom he will buy. He has a right to impart to anyone else any information he may have about the business methods of anyone, even though the natural result of thus telling what he knows may induce the person whom he tells to cease business relations with the other person. May the several retail dealers combine into an association in order the better to acquire and distribute knowledge about the business methods of others, by means of the circulation among themselves of reports such as these?

It seems to us that they cannot do so without violating the Sherman Act. It is now well-settled that the words "restraint of trade" in that Act are to be construed as including "Restraint of Competition." Full, free and untrammeled competition in all branches of interstate commerce is the desideratum to be secured.

Much is said in the argument of the evils which will result if the retailer dealers are prevented from taking

defensive measures to restrain the competition with them of the wholesaler, who having no yard and not seeking the smaller local trade of the retailer, is endeavoring to take away the profitable part of his trade. It is pointed out that it is expensive for a retailer to maintain a yard with large quantities of a great variety of lumber in it ready for prompt delivery at all times. If his business shrinks through his losing the chance of making car and schooner load sales in his locality, the local yard, it is said, will become less and less well-stocked and will finally disappear entirely. But with such ultimate results the Court is not concerned: Congress has considered the results and chosen what seemed to it the wisest course.

"Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition * * * may be productive of evils, does not militate against the fact that such is the law now governing the subject" (*U. S.* vs. *Freight Association*, 166 U. S., 337).

The circulation of this circular certainly tends to restrain, directly, some wholesalers from entering into competition with retailers. This seems to be contrary to the statute as the Supreme Court has construed it.

That the defendants and their members are in a combination to prepare such circulars and to distribute them is manifest.

We conclude that the Government is entitled to an injunction against the further circulation of the "Official Reports."

U. S. District Court, S. D. of N. Y.,
Filed Jan. 9, 1913.

[End of Opinion.]

With this conclusion these appellants respectfully disagree, insisting that, a combination to circulate these lists is not a combination within the inhibitions of the Sherman Act, and as that was the only combination appearing in this litigation, the petition of the United States should have been dismissed.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

The assignment of errors interposed by these appellants will be found at pages 31 to 33 of Volume I of the record. They cover each portion of the decree, and so reiterate with perhaps unnecessary prolixity, the one fundamental error assigned. That error is in holding that the combination of the defendants to prepare and distribute the circulars or lists was a combination in restraint of trade as prohibited by the Sherman Act. These appellants insist that the combination, although undoubtedly existing for the object stated (among others not criticised), was a combination for an entirely lawful purpose.

BRIEF OF THE ARGUMENT.

I.

The Sherman Act prohibits simply undue limitations on competitive conditions.

The learned Circuit Judges in the Second Circuit are, of course, as familiar with the standards to be applied under the Sherman Act as ourselves, and we must confess to a slight mystification as to why the sole citation of authority in the opinion below was not only the *Freight Association* case, 166 U. S. 290, which was the storm centre in the arguments of the *Standard Oil* case, 221 U. S. 1, but that the learned Circuit Judges quote particular phrases from the opinion in the *Freight Association* case and apply those phrases in such a way as to shatter the standard of reason as a guide for decision in these litigations. It would seem as if they had intended, either to base their conclusions directly against the doctrine of the recent cases in the Supreme Court, or, if that be scarcely compatible with their high intentions and great learning, then to point out to this Court that if it applies the rule of reason the decision must be the other way.

However, and with whatever significance, the fact remains that the Court below put its most express reliance upon the *Freight Association* case ; and therefore it surely behooves us the more to call attention—at greater length than we otherwise would—to the most recent views of this Court upon the Sherman Act :

In *Nash* vs. *United States*, decided June 9, 1913, 229 U. S. 373, Justice Holmes, speaking for the entire Court with the exception of Justice Pitney (and probably not with the exception of Justice Pitney upon this particular point), says that the *Standard Oil* and the *Tobacco* cases

> " may be taken to have established that only such contracts and combinations are within the Act, as by reason of intent or the inherent nature of the contemplated acts, prejudice the *public interests* by *unduly* restricting competition or *unduly* obstructing the course of trade."

Justice Holmes proceeds to point out that on account of those decisions

> " it is said that the crime thus defined by the Statute contains in its definition an element of degree as to which estimates may differ."

The learned Justice answers this assertion, not by cutting it down as a wrong conclusion from the decision in the *Standard Oil* case, but by intimating that it is a *right* conclusion from that decision, (and then by holding that it makes no difference, as many crimes defined in different statutes contain that element of degree as to which estimates may differ, and that the Act cannot be said to be unconstitutional as a Criminal Statute on that account).

The words of the statute " in restraint of trade," or of the title of the statute " An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," indisputably, in each case, invite inquiry as to whether the combination in question (we are now using the words

of Justice Lurton in the *Reading* case, 226 U. S., at p. 369) operates to

> "*unduly* suppress competition and restrain freedom of commerce."

Justice Day in the *Union Pacific* case, 226 U. S., says that

> "The statute should be given a reasonable construction, with a view to reaching those *undue* restraints of interstate trade which are intended to be prohibited and punished."

This was said at page 84 of the opinion and at page 88 the learned Justice speaks of "that incidental* restraint of trade which ought not to be held to be within the law."

In the *St. Louis Terminal* case, 224 U. S., Justice Lurton, in speaking for the Court, puts the question before the Court as to whether the combination then under discussion "is a facility in aid of interstate commerce or an *unreasonable* restraint forbidden by the Act of Congress" (pp. 394–395).

It therefore appears that the later cases in this Court have only confirmed and crystalized the views of the Court contained in the opinions of the Chief Justice in the *Standard Oil* and the *Tobacco* cases, in 221 U. S., pertinent extracts from which it can not be amiss to set down here:

(P. 58): "Without going into detail and but very briefly surveying the whole field, it may be with

* "Incidental" restraints, really laudable, are illustrated in the resolution at p. 364 of the opinion in the *Reading* case, and also in the pledge mentioned at p. 348.

accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."

* * * * * * *

(P. 59): "(*b*). That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint."

* * * * * * *

(P. 60). "Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

II.

The combination, or concerted action, of these defendants in distributing circulars stating the true position of lumbermen in the trade, was not a combination which unduly restrained competition.

(*a.*)

Here, of course, is the fundamental question in the case; and the first subordinate question is of an accurate guide towards its solution.

We are mindful of what was said by the Chief Justice in the *Standard Oil* case that "acts were at one time deemed to be of such a character as to justify the inference of wrongful intent, which were, at another period, thought not to be of that character." Representing the defendants in this case, that rule is here hardly a cause for comfort—because, had that rule not existed, this case probably would never have been brought, and certainly never could have been for a moment sustained. A very slight knowledge of history recalls that in the Middle Ages and until comparatively recent times,

the law of trades was largely the law of guilds; craftsmen were not only expected to keep to their own calling, but were obliged by their rules to confine themselves within the lines of their own business, and to deal in it according to its customs and in no other way. The trade union of the present day, in its limitations for its members upon hours of work, upon the nature of the work of its members, and the like, still holds to rules, and without a shadow of suspicion that they are in restraint of free trade and competition. In 1893, when the case of *Bohn Manufacturing Co.* vs. *Hollis*, 54 Minn., 223, was decided, combinations of retailers refusing to deal with wholesalers who sold direct to consumers, were surely legal. It seems that a like concert of action was considered legal as late as *Montgomery Ward & Co.* vs. *So. Dakota Retail Merchants' & Hardware Dealers' Ass'n*, decided in 1907, 150 Fed. Rep., 413. Such cases as these go vastly farther in their holdings than anything that we ask the Court to hold in the case at bar. While in those cases an agreement and combination to refuse to deal was conceded, in our own case, as pointed out at page 15 of this brief, the contrary is the fact. There is no such agreement, and there is no concerted action whatever among the defendants based upon the information furnished by the so-called "official reports."

It may be thought that precedent of custom in favor of these defendants, and precedent of cases which *a fortiori* would require a decision in their favor if such authority were to be followed, would

be safe ground whereon these appellants might stand. Still, for all that, no prudent counsel can shut his eyes to the great changes in standards, and to the fact that old customs and earlier cases relative to this subject of restraint of trade may be of little use if against advancing business ethics of the day.

Speaking merely for the appellants represented by us, and, of course, not intending to impinge upon any argument which our associates may make, we are quite ready to concede that the questions in this case will not of necessity be decided upon the customs and precedents of the past. On the other hand, it is still equally certain that not every "tendency" to restrain trade is within the prohibition of the Sherman Act. The "purpose of reasonably forwarding personal interest and developing trade" (to use the words of the Chief Justice) is a purpose which may frequently cause, what Justice Day terms, "that incidental restraint of trade which ought not to be held to be within the law". The Sherman act is not to be applied to a *reductio ad absurdum*. The parent who insists that his son should go into the coal business rather than into the lumber business and thus eliminates one competitor from the lumber business, is not restraining trade. The Secretary of a Lumber Association who informs its members that a given lumber dealer is not good pay, and who thereby limits the activities of that lumber dealer in the trade, is not guilty of restraint of trade. A combination in the form of a Credit Association that had such ends in view would clearly not be a combination in restraint of trade. A union of two competitive concerns for the legitimate

purpose of utilizing larger capital and greater skill through the combination, although the elimination of a competitor is incidental, is not a combination in restraint of trade. In the *American Tobacco* case it was expressly stated in the opinion of the Court (p. 177) that there might well be contracts and combinations lawfully and legitimately formed for the purpose of ending trade wars.

Of course it has had to be that the standard of reason should be applied in such matters. And applying the standard of reason, and yet eliminating the standard of precedent of such cases as we have cited above, and on which we might have relied with security some years ago, we undertake, with deference, to advance the following *rationale* as perhaps the most obvious guide to a solution of this case:— Is the circulation of these lists a reasonable defensive measure, whose object is to enable each retailer to protect his own business; or is it an unreasonable, offensive and malicious measure to eliminate competitors in the business? If the Court can suggest some better guide for the decision of this particular case, we shall, of course, bow at once to its views; but upon considered reflection the one that we have advanced seems as fair as can be thought of.

Such a guide has, at least by analogy, been suggested heretofore in a number of cases.

In *Aikens* vs. *Wisconsin*, 195 U. S., 194, a Wisconsin statute was under discussion whose language provided that combinations "for the purpose of wilfully or maliciously injuring another in his reputation, trade,

business or profession," were criminal. The plaintiffs-in-error having been indicted for a combination for such purposes, and such indictments being sustained in the state courts, the constitutionality of the act was attacked in this court as a deprivation of that liberty of action which is guaranteed by the United States constitution. This court construed the Wisconsin statute to require an element of malice in fact to enter into the crime, and held that *as so construed* the statute was constitutional.

It was strongly suggested that merely a wilful combination to injure others in their trade could not have been, constitutionally, the subject of a crime. And the present Chief Justice dissented from the conclusions of the court on the ground that it was impossible to read the phrasing of the Wisconsin statute in such a way as to bring in the element of malice as a *necessary* ingredient, the Chief Justice holding that without such an ingredient as one of the necessary elements the statute would have been unconstitutional.

In *Mogul Steamship Co., Ltd.*, Appeal Cases 1892, 25, Lord Halsbury, L. C., says of the facts there presented, at pages 36–37:

> "And upon a review of the facts, it is impossible to suggest any malicious intention to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade to yourselves. If such an injury, and the motive of its infliction, is examined and tested upon principle and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all competition must be malicious and consequently un-

lawful, a sufficient *reductio ad absurdum* to dispose of that head of suggested unlawfulness. * * *

Intimidation, violence, molestation or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful."

At page 38 Lord Halsbury adds:

"What legal right has been interfered with? Because if no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual but cannot be done by a combination of persons."

He further adds, however, at page 38:

"I do not deny that there are many things which might be perfectly lawfully done by an individual, which when done by a number of persons becomes unlawful. * * * But in this case the thing done, the trading by a number of persons together, effects no more and is no more, so to speak, a combined operation than that of a single person."

Lord Watson, delivering a separate opinion, says, at page 42:

"If the respondent's combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your Lordships. But no such case is presented by the facts disclosed in this appeal."

Lord Field, at page 52, illustrates what may and may

not be done as follows, referring to a decision and opinion by Lord Holt:

> "In support of this view he '(Holt)' referred to earlier authorities. In one of them it had been held that for the setting up of a new school to the damage of an ancient one by alluring the scholars, no action would lie, although it would have been otherwise if the scholars had been driven away by violence or threats. * * * Of course it is otherwise, as pointed out by Lord Holt, if the acts complained of, although done in the way and under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill will to him, and not the pursuit of lawful rights."

Lord Hannen concurred in this, after saying at page 59:

> "* * * I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefitting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure the plaintiffs whether they, the defendants, should be benefitted or not."

In *Nat'l Protective Ass'n* vs. *Cumming*, 170 N. Y., 315, Parker, Ch. J., adopts the language of Judge Vann's dissenting opinion at page 321:

> "They" (workingmen) "have the right to strike; that is, to cease working in a body by pre-arrangement until a grievance is redressed, provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to

harm others, but to improve their own condition, is not in violation of law."

In *Mills* vs. *U. S. Printing Co.*, 99 App. Div. (N. Y.) 605, Mr. Justice Jenks says at pages 608 and 609 :

> "What one may lawfully do alone he may do in concert and hence a strike is not *per se* unlawful. The Court, in *National Protective Ass'n* v. *Cumming* (170 N. Y. 315–321), did not differ over the proposition that 'a peaceable and orderly strike, not to harm others but to improve their own condition, is not in violation of the law.' (See too *Wunch* vs. *Shankland*, 59 A. D., 482)."

Justice Jenks, after quoting from Judge Cooley's work on Torts, 2d Ed. p. 328, to the effect that it is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, adds at page 610 :

> "If A, C, D and E cannot do what A alone may lawfully do, the vice must be in the combination. But there is no dissent in our highest court over the proposition in *National Protective Ass'n* vs. *Cumming* (*supra*), that 'whatever one man may do alone he may do in combination with others, provided they have no unlawful object in view.' * * * It is not in the breast of the Court to stamp as illegal a combination for the betterment of the interests of the members thereof, or of some of them, and which, without incidental violence or intimidation, severs all business dealings with an outsider until it may secure it."

To the same effect Lord Shand, in *Quinn* vs. *Leathem*, Appeal cases, 1901, 495, at p. 514, says of his opinion in *Allen* vs. *Flood*, Appeal cases, 1898, 1, as follows :

> "* * * The purpose of the defendant was, by

the acts complained of, to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear there was combination, the purpose of the defendants was 'to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests.'"

He also says, at page 512, referring to *Allan* vs. *Flood*:

"In that case I expressed my opinion that while combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour, yet that combination for no such object but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful; and, having considered the arguments in this case, my opinion has only been confirmed."

In *Ertz* vs. *Produce Exchange of Minneapolis*, 79 Minn., 140, Start, Ch. J., speaking of *Bohn Mfg. Co.* vs. *Hollis*, 54 Minn., 223, says at page 144:

"It is to be noted that the defendants in the *Bohn* case had similar legitimate interests to protect, which were menaced by the practice of wholesale dealers in selling lumber to contractors and consumers, and that the defendants' efforts to induce parties not to deal with offending dealers were limited to the members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons not members of the association to withhold their patronage from such wholesale dealers."

Chief Justice Start then points out that the situation

was different in the *Ertz* case where the combination "was for the sole purpose of injuring the plaintiff's business, and that the defendants conspired to induce the plaintiff's patrons and persons, other than the defendants, to refuse to deal with him."

In *Macauley Bros.* vs. *Tierney*, 19 R. I., 255, Matteson, Ch. J., says at page 259:

> "Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profit by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction or molestation of the rival or his servants or workmen, and the procurement of violation of contractual relations, are instances."

The learned Justice then refers to the *Mogul Steamship Co.* case, L. R., 23, Q. B., 598, 614, and quotes Bowen, L. J., to the same effect, and especially as follows (260):

> "To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection."

In *Walker* vs. *Cronin*, 107 Mass., 555, Wells, J., says at page 564:

> "If disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of

others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

In *Carew* vs. *Rutherford*, 106 Mass., 1, Chapman, C. J., says at page 14:

> "And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price or without certain conditions."

In *Continental Ins. Co.* vs. *Board Fire Underwriters, etc.*, 67 Fed. Rep., 310, Justice McKenna, then Circuit Judge, after reviewing the English and American cases and quoting at length from Lord Justice Bowen's opinion in the *Mogul Steamship* case, says at pages 320-321 :

> "So Judge Taft said in his very able opinion in *Toledo A. A. & N. N. R. Co.* vs. *Pennsylvania Co.*, 54 Fed., 738. Such combinations are said to be unlawful conspiracies, though the acts in themselves and considered singly are innocent, when the acts are done with malice; *i. e.*, with intention to injure another without lawful cause. * * *"

In *Collins* vs. *American News Co.* (N. Y. Sup. Ct., 1901), 34 Misc., 260; aff'd 68 App. Div., 639, Gildersleeve, J., writing the opinion, says at page 263:

> "Do the publishers propose to do anything unlawful in directing the American News Company to discontinue the sale of papers to the plaintiff unless he shall desist from using them as a medium for the distribution of circulars, hand-bills, etc.? * * * The fact that the publishers have, in the language of the

Complaint, 'confederated' to discontinue plaintiff's supply of papers unless he shall agree to desist from using them as a medium of distributing hand-bills, etc., does not aggravate their conduct towards the plaintiff. What any publisher could lawfully do individually, all the publishers may lawfully combine to do. There is no charge in the Complaint of malice or oppression, and it does not appear that the act contemplated by the publishers is in itself unlawful or malicious. * * * By reasonable intendment the defendants seek not to injure the plaintiff, but to protect themselves by preventing him from making such use of their publications as shall make him a competitor with them in the business of advertising. * * * This is not the case, of which there are many examples in the books, of strangers maliciously intermedling in matters between other parties which do not concern them."

Judge Gildersleeve adds at page 265 :

"There is no place in any system of jurisprudence yet devised for the principle that a man may be compelled to sell his goods or his labor to one with whom he does not wish to deal, merely because his refusal to do so may cause loss to him who wants them" (citing *Mogul Steamship* case, *supra*).

In *Dueber Watch Case Mfg. Co.* vs, *Howard, &c., Co.*, 55 Fed. Rep., 851 (U. S. C. C., S. D. N. Y.), Judge Coxe says at page 854 :

"The construction contended for by the plaintiff would render each of the defendants liable to an indictment not only, but would render unlawful almost every combination by which trade and commerce seek to extend their influence and enlarge their profits. It would extend to every agreement where A and B agree that they will not sell goods to those

who buy of C. It would strike at all agreements by which honest enterprise attempts to protect itself against ruinous and dishonest competition. It is thought that these views are in conformity with the decisions of the Courts construing the Act of 1890" (citing cases).

On appeal to the U. S. Circuit Court of Appeals, the action of the Circuit Court in sustaining a demurrer to the complaint was affirmed. (See *Dueber &c. Co.* vs. *Howard &c. Co.*. 66 Fed. Rep., 637). Lacombe, C. J., writing the majority opinion, says, at page 645 :

> "It is not an unlawful business enterprise for sellers to seek to secure the entire trade of individual buyers, and an agreement between sellers, who wish to confine their dealings to such buyers only, not to sell to others, is not an unfair or unreasonable measure of protection for such trade. Nor can it be claimed that such an agreement between sellers who represent but a part of the trade is injurious to the public, which has all the rest of the trade to deal with."

Wallace, C. J., in a dissenting opinion, says at p. 652:

> "I do not question the right of the defendants to combine for their own protection against unfair competition, and in that behalf, their commodity not being one of prime necessity, to agree not to sell to those who do not buy exclusively of them, or who buy of the complainant or some other obnoxious competitor; but I repudiate the doctrine that they can combine to induce the customers of a rival manufacturer not to deal with him unless he will join their combination. Upon the averments in this complaint which are, of course, to be taken as true for the purposes of the demurrer, this case is one in which the

defendants are acting not from motives of self-protection, but oppressively and are actively concerting to destroy the business of a rival by inducing other dealers not to trade with him because he will not sell his goods at their prices."

In *Wabash R. R. Co.* vs. *Hannahan*, 121 Fed. Rep., 563, Judge Adams after saying that "what one man may do all may do" adds at page 569:

"The resulting right to strike or quit their employment is a weapon for the defense and protection of employes, and not a weapon of attack."

In *Toledo A. A. & N. M. Ry. Co.* vs. *Pennsylvania Co.*, 54 Fed. Rep., 730, Taft, C. J., says at page 738:

"As usually understood, a boycott is a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them. Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do that which the combiners seek to compel them to do. Such combinations are said to be unlawful conspiracies, though the acts in themselves and considered singly are innocent, when the acts are done with malice, *i. e.*, with the intention to injure another without lawful excuse. See the judgment of Lord Justice Bowen in *Steamship Co.* vs. *Mc-*

Gregor, 23 Q. B. Div., 598; *Walker* vs. *Cronin*, 107 Mass., 555; *Casey* vs. *Typographical Union*, 45 Fed. Rep., 135; *Steamship Co.* vs. *McKenna*, 30 Fed. Rep., 48," and other cases.

(*b.*)

Assuming that such are to be the standards by which the facts in this case are to be adjudged, and proceeding with the discussion on that basis, perhaps mention should first be made of one or two pertinent features of the case not given much prominence in the opinion below.

One salient feature of the evidence is that, so far as appears, any human being may become a retail lumber dealer and may join any of these Associations and participate in such benefit as accrues from receiving the information set forth in these lists. At least so far as the Philadelphia Association is concerned, the testimony is undisputed that it has never refused admittance during the whole nine years of its existence to any person, firm or corporation engaged in the retail lumber business in Philadelphia or its vicinity (Vol. X of the record p. 230). So far as our recollection of the testimony goes, the same is true of all the other associations.

Another salient feature is that none of the Associations make any attempt whatever to fix prices. Pooling arrangements and other means for the fixing or uncompetitive establishment of prices, are the first indicia of undue restraint of trade. The testimony of the Philadelphia defendants is definitely to the absence of any

such combination, and their testimony is uncontradicted. (see Vol. X, pp. 234, 235, 269 of the record). As far back as 1902 Mr. Maule, the Secretary of the Philadelphia Association, was writing of the (then) Association that it "has no jurisdiction over its members in regards to what prices they should sell their lumber, and in what territory." (Vol. IV, pp. 451–452). Such, so far as appears, is the situation to-day.

A third salient,—and most important,—feature is that the placing of a man on one of these lists—(we speak now independently of the moral sting which, of course, must occur through a man's being discovered in secret competition against open competitors)—is only to bring out a lumber dealer into the same situation as all acknowledged retailers are. The President of this Philadelphia Retail Lumbermen's Association does not, ordinarily speaking, buy his lumber from the Vice-President, or vice versa. In acknowledging themselves to be retail lumber dealers they *ipso facto* put themselves, to a certain extent, out of competition for direct business the one with the other; because seldom do competitors in trade buy from or sell to the other, as that is for the one to provide the other with powder for the fight. The trade of a retail lumber dealer is, of course, "restrained," so far as selling to other retail lumber dealers is concerned, by the very fact that he is a retail lumber dealer and therefore the others' competitor. So then, when the supposedly wholesale lumber dealer is discovered as conducting a retail business he falls into a new category for him; *but it is only the same category in which all the acknowledged retail lumber dealers are*

already. If it is to the interest of a retail lumber dealer to buy of this supposed wholesaler, but now discovered retailer, it is done (Vol. X, pp. 233-234, 258, 270, 279). Other things being equal, of course, it would not be done, but it would be done to no less extent than one retailer would ever be buying of another. There ought not, it would seem, to be any "conspiracy" to restrain trade when a natural and uncontrovertible law of trade is taking its usual course. Competitors do not as a rule deal with each other, and no amount of law suits could make them.

Fourthly, The essence of the reason for these lists is protection against *secret* competition. The record is filled to overflowing with proof, in the first place, that lumber yards are a necessary part of the lumber business in this country if consumers of lumber are to be adequately served; and in the second place, that the ownership of a lumber yard, with its attendant locking up of capital and incidental costs, and the furnishing of yard service, make large extra operating expenses which oblige the lumberman who owns a yard and furnishes its service for the use of his customers, to charge a higher price for his lumber on that account. Any such lumberman, owning a yard, assumes that another dealer, who does not own a yard in his locality, is a wholesaler; and he further assumes that in accordance with the customs of the business that wholesaler will not be undertaking to sell to the consuming trade. If such wholesaler goes contrary to the usual custom and does in fact sell to the consuming trade, it is very necessary for the acknowledged retailer to become aware of that fact, in

order that he may discover the secret sources of his competition to the same extent that he knows the open sources, and so seek to meet it. Therefore, again, it would seem at first blush too plain for argument that the acknowledged retailer may discover, and may enter into a combination by which there shall be more effectively discovered, a class of people in the lumber business who do not admit that they are retailers and who, nevertheless, are competing for the retailer's trade. A combination or association to ferret out and publicly disclose the real competitive business of one who was not supposedly a competitor, is a combination that has nothing to do with any questions of restraints of trade.

(*c.*)

Next to consider the reason assigned by the Court below for its decision, and the arguments advanced by the other side.

(1) The Court says that "the 'Official Report' is a method adopted by the retailers to check *this competition.*" It then proceeds to define "this competition" in the subsequent paragraphs as a competition for the patronage of the *consuming* trade, which "some wholesalers who otherwise would enter into competition with retailers in supplying consumers" forego, rather than be on these lists. The Court concludes that the circulation of these circulars "certainly tends to restrain, directly, some wholesalers from entering into competition with retailers."

Do these phrases in reality correctly denominate the

result of these circulars? Rightly analysed, it seems to us that the circulation of the lists tends to make certain people in the lumber business elect to do a wholesale business entirely—but to make the election for the *futherance* and advancement of their own trade. The record discloses instances of people who are known in the lumber business as wholesalers *and* retailers. Such people decided upon the double nature of their business, undoubtedly advisedly, and with a knowledge of the advantages and disadvantages that follow from engaging in both branches of this business. They are known as wholesalers and retailers. Being known as retailers, undoubtedly they are not so sought after by other retailers to sell to them as are wholesalers who confine themselves purely to a wholesale business, and this for the reasons above suggested. But nevertheless they have thought it for their advantage to be in both branches of business, and therefore they are. Other people decide that they will confine themselves entirely to the wholesale business as the most advantageous business for them; and this they do—as the Court points out—because they are afraid that their being in the retail business will hurt their wholesale business, and therefore—as we point out—because they value their wholesale business too much to jeopardize it by going, like other people, into the two branches. This election to confine oneself to one trade, rather than to embrace two trades, is a voluntary election induced for business reasons and according to the business judgment of each individual. But it is no undue restraint of trade. How can it be?

At most, the situation falls into the class described by Justice Day as "that incidental restraint of trade which ought not to be held to be within the law," since the guiding motive of the wholesaler who does not seek the consuming trade is the "purpose of reasonably forwarding personal interest and developing trade" (the words of the Chief Justice) with the retailers whose patronage he more greatly values.

Of course what we have said upon this particular point presupposes that there is evidence in the record that wholesalers have refrained from seeking trade of the consumers on account of these lists. The above answer seems to us, with great deference, to be sufficient to meet the views expressed by the court below, so that it ought not to be necessary to advance any further argument; but at the same time, it is proper to point out that the conclusion that these lists have restrained any wholesalers from seeking the consumers' trade is a conclusion of inference rather than of testimony. Our own view is that the abstaining of wholesalers from seeking the consumers' trade is from the underlying motive that it is against general trade interests and ethics.

(2) With the greatest deference, it seems to us that the Court's reasoning as to the impelling consideration that confines wholesalers to the wholesale trade exclusively, is not as strong as the mere appeal *ad hominem*, which we next consider. The trouble about these lists, at bottom, lies in the fact that it *is* against *trade ethics* to engage in secret competition. The dealer whose name appears on these lists really occupies no other

position than the dealer who acknowledges that he is both a wholesaler and a retailer and takes the bitter and the sweet of the double business. But it is the discovery and disclosure to the business community of doing something which a dealer pretended not to be doing, that puts the sting into the circulars. Therefore is there objection to them, and therefore are they called "Black Lists" and other like opprobrious names. When all is said and done, it is these attributes connected with the lists, *having none of them anything to do with restraint of trade*, that bring out the acrimonious criticism of their existence.

It is instructive to get from the testimony the underlying objection of lumber dealers to being on one of these lists. This Court may be interested in reading, for instance, the cross-examination of an extremely militant witness for the Government, Frank E. Sheldon (Vol. II, p. 143 and on through pages 144, 145, 146). The witness criticism of the lists is absolutely emotional, going to the public portrayal of conduct which, apart from being lawful or unlawful, was regarded in the trade as conduct of a sneak. None of the witnesses object to the theoretical fact that a man's true position in the lumber trade should be known. He objects to its being known in this way, through these lists. But what has that to do with restraint of trade?

We call to the Court's particular attention in this connection, that in this aspect (as in many others) these lists greatly differ from the "unfriendly" and "unfair" circulars that are common in connection with the Labor Unions. It would be practically impossible

to employ in secret non-union labor, certainly not if it was employed together with union labor. The circularization of an employer for the employment of non-union labor *ex necessitate* has an element of malice as the question of the kind of the labor employed by a man, in no way affects the interests of the outside recipients of these "unfair" circulars. In the instance at bar, the lists are addressed to persons legitimately interested, and are merely to bring a man out in his true colors; surely a legitimate end to be attained, and sought by proportioned means.

(3) We ourselves invite attention to the strong admonition to members of the Associations that these lists were *confidential* communications. The lists being a legitimate protective measure, were addressed only to those whose interests were to be protected. As said above, this is evidence of their propriety. Incidently it may be that another reason for making them confidential was so as to secure a defense of qualified privilege in the event of any libel suit. It may be noticed upon the question of libel that there is nothing in the language of these circulars which is defamatory, and, therefore, nothing in the circulars which would make them libelous *per se.*

(4) There has been throughout the Government's prosecution of this action an implication, falling short of an express charge, and wholly unsupported by the evidence, to the effect that the increased cost of lumber that has of late years obtained in this country, has been caused by the circulation of these lists. The idea has been industriously put forward that

there is an unnecessary extra middleman in the lumber business, who takes his own profit at that much additional cost to the consumer. Whether the charge, if sustained, would be pertinent or not, we must distinctly take issue with the correctness of the charge. The proof in the record is directly to the contrary. See, for instance, Vol. X, pp. 239, 259, 273, 277.

The fact is that the retailer sells at higher prices than the wholesaler where the consumer requires the facilities of the retailer's yard. But where there are no such facilities required, whether of storage or handling, and where immediate delivery is not of prime importance, the retailer has to, and in point of fact does, enter into competition with the wholesaler and meets the wholesaler's prices. There is no room for argument about this because the testimony is all one way. Indeed, in the brief of the Government below, the retailer was really criticised for entering into competition with the wholesaler. Such evidence is clear proof that any increased cost in lumber in present years is *not* due to the retailer.

The testimony goes further: It not only shows that the present mode of business, as between wholesalers and retailers, is not the cause of any increase in the cost of lumber, but the record likewise makes clear what has been the cause of the increased cost of lumber. One witness, Mr. Chesnut, gave a very thoughtful and considered explanation for the cause of present prices in lumber (see Vol. X, pp. 270–271). Increased cost has come through lack of attention to the conservation of our natural timber resources, the increased value of tim-

ber lands, and the added length of transportation in getting timber to the market as the nearer forests are finished up. Various economical conditions, such as the tariff and the like and the general increased cost of living, might also be put forward as reasons for the increased cost of lumber. Of course, such are obviously not for the consideration of this Court. It suffices that it does definitely appear that the increased cost is not on account of any unnecessary extra middleman who compels a profit to himself on top of the profit taken by the other classes in the trade.

(*d.*)

To recapitulate the long argument contained in this Point :

We take it that the question to be solved invites an inquiry as to whether the circulation of these lists is a fair defensive measure, or a malicious and unwarranted aggressive measure. As factors bearing upon this inquiry, we have called attention to the fact that the defendant Associations were open to all, and in no respect closed Associations. We have noted that there was no attempt to fix the prices of lumber material in any of these Associations. We then called attention to the fact that to place a lumber dealer upon these lists put him only in the same category, except so far as moral sting was concerned, that all acknowledged retailers were ; and that the underlying function of the lists was the better to discover competitors who acted in secret, and whose competition was on that account unfair.

After noting these factors, and then taking up the views of the Court below, we respectfully insisted that the custom of circulating these lists acted not to restrain wholesale lumber dealers from becoming retail lumber dealers, but to cause them openly and fairly to make an election as to whether they would have the single or the double calling. This election all lumber dealers have of necessity to make, and the influence of the lists is only to debar its being made secretly and furtively. The moral sting of the lists is a matter that has nothing to do with restraint of trade. It advances our argument that the lists are circulated confidentially. The lists have not been the influencing factor in the enhancement of lumber prices in this country, and are not "a prejudice to the public interests."*

When all of these elements are taken into consideration, we earnestly insist that the circulation of these lists is a proper and legitimate practice in the lumber business, and that judged by the standard of reason, there is nothing to bring these defendants within the category of transgressors of the Sherman Act.

In conclusion, upon this point we may call attention to a paragraph in the opinion of this court in *Aikens* vs. *Wisconsin*, cited *supra*.

> " Finally it is argued that the Supreme Court of Wisconsin would hold that the statute extends to acts of which the motives were mixed and which were done partly from disinterested malevolence and partly from a hope of gain. If so, it is said, the statute would be open to all the objections at which we have hinted in dealing with the word 'willfully.' The Supreme Court did use some language which looked

*The decree below prejudices the public interests, if its continuance result in a decrease of lumber yards, which public convenience greatly demand.

that way, but we consider it to have decided that the statute would be confined to combinations with intent to do wrongful harm, 110 Wisconsin, 193, 260. Thus limited, on whatever ground, the statute would punish only combinations of a kind for which no justification could be offered and those which were taken out of the justification by the motive with which they were made. We see no sufficient reason to believe that the court will go farther or construe the act in such a way as to raise questions which we need not go into here. Therefore it is unnecessary to consider whether, on a more literal construction, the portion dealing with malicious intent could be separated from that which deals with the purpose of merely willful injury, and saved, even if the latter were held to go too far. Probably the two phrases will be read together and the statute made unquestionable as a whole."

May we suggest to this court, after reading the language of this decision handed down by it, that under the views there entertained a spice of not unnatural "malevolence" would be swallowed up in the broad protective character which is the underlying purpose of these lists. If there were any such subordinate spirit of malevolence—a fact which we do not for one moment concede—nevertheless that would make no difference in the legality of the circulation of those reports.

III.

The Question of Boycott.

(*a.*)

As counsel for these appellants understand the testimony, there ought to be no question of boycott in this case, no matter which of the changing definitions of that word are adopted. A boycott would involve, to say the least, a combination or conspiracy among the defendants to refuse to deal with anyone on the lists in question. We have already noted that the Court below found that members of the defendant associations were not required by their associations to refrain from dealing with lumber dealers on the lists. The Court found that there was no fine or penalty for dealing with them, and that a retailer who did deal with them was not disciplined in any way (see p. 13 of this brief). We detailed in the opening statement of this brief, at page 15, testimony in the record to the effect that there was no agreement or concert of action as to what attitude members of the associations would take towards people on the lists.

The Court below does not find that any sort of boycott existed. It summarizes, however, the situation through a quotation from our own brief below, in this language :

> "Ordinarily speaking, and other things being equal, a retailer would not buy his own source of supply from people on these lists,"

the Court giving the obvious explanation for this, namely that

> "a retail lumber dealer who learns that some wholesaler has taken away customers from another retail lumber dealer, will not be likely to buy from him, lest learning the names of his own customers the wholesaler might compete with himself to get their trade."

We insist that a conspiracy within the Sherman Act can never be predicated upon the fact that a number of different people, when advised of a situation, are likely to take the same course of action. If the opinion of this Court in the well known case of *U. S.* vs. *Kissel*, 218 U. S., 601, be carefully examined, there seems to be a holding in that case that a conspiracy can only be predicated upon an actual agreement, express or implied. At least there must be some question of the meeting of minds, or *intentional* concert of action, that shall be the basis of any combination or conspiracy whatever. It would not be combination, in a conspiracy sense, if all of an audience fled in concert from a burning theatre; nor can there be any conspiracy in this case because most of the retailers, guided by instincts of self-preservation, have acted in "concert" with relation to the wholesalers on these lists.

In *U. S.* vs. *Reading Co.*, 226 U. S., 324, this Court, speaking by Justice Lurton, and with its usual fairness of vision, took pains to point out that in these Anti-Trust cases, as in any other cases, a combination was to be proved by *evidence*. It is not enough that the situation invited one; but there must be evidence that it

existed. We ask the Court's attention to its language in the *Reading* case at pages 343 to 346 of the reporter, under the heading of " The Scope and Theory of the Bill."

(*b.*)

However, the fact that we insist that there is no evidence of boycott in this case, is no reason why these appellants should be debarred from also insisting that there are boycotts and boycotts, and that some of them do not come within the prohibitions of the Sherman Act. We take the position that instances of boycott coming before the Courts of late in connection with Anti-Trust Acts, have been decided adversely to the defendants only where threats or acts of violence were an integral part of the boycott, or else in instances where the Court in question has explicitly held that the standard of reason was not involved in the language of the particular statute discussed. Undoubtedly among the changing drift of judicial sentiment as to what is lawful and what is unlawful in the manners and customs of business, there has been an increasing tendency on the part of the Courts to declare a boycott illegal. It is interesting to refer to Cooke on Combinations, Monopolies and Labor Unions, written in the year 1909. In Chapter V, headed " Boycotts," Mr. Cooke still stands strongly for the old rule that apart from acts of violence or acts producing fear of violence, " the right to institute a mere boycott ' is a part of the liberty of action which the constitutions, State and Federal, guarantee to the citizen.' " Mr. Cooke

stands by the right of one man to refuse to deal with another, and the right of a combination to refuse to deal. He acknowledges, however, that the more recent tendency is at first hand to assume a boycott, in all senses that the word is used, to be something which is illegal and in restraint of trade. We think that the Courts have not yet gone that far.

In this Court the celebrated case, of course, is that of *Loewe* vs. *Lawlor*, 208 U. S., 274. It was decided upon a demurrer. But here circularization of the offending factory by the Labor Unions for employing non-union labor was a very mild part of the offense charged in the bill. The Labor Unions also circularized all jobbers and dealers in hats who bought from the offending factory, and in direct terms the Labor Unions begged that "under these circumstances all friends of organized labor, and those desiring the patronage of organized workers, will not buy goods from," etc., naming the dealers who bought from the recalcitrant factory. The bill also charged that the Labor Unions had caused

> "by means of threats and coercion, and without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all the makers and finishers of hats then working for them, who were not members of their said combination, The United Hatters of North America, as well as those who were such members, and thereby cripple the operation of the plaintiffs' factory and prevent the plaintiffs from filling a large number of orders then on hand."

It was in connection therewith that the charge was made in the bill that they had declared "a boycott" as aforesaid. The bill charged that, "the same was

to be actively pressed against them." The bill charged that the Labor Union had employed "a large number of agents to visit said wholesale dealers and their customers, at their several places of business, and threaten them with loss of business if they should buy or handle the hats of the plaintiff."

In other words, there was charged in the *Lawlor* case not alone a mere circular, and not only what is called a "secondary" circular, and not only a very well developed boycott, but a boycott that was in effect connected with violence. It does not seem to us that the *Lawlor* case has by any means decided that all boycotts are illegal.

The other celebrated boycott case in this Court is that of *Gompers* vs. *Buck Stove & Range Co.*, 221 U. S., 418. But there the matter only came up upon contempt proceedings, and the defense was obliged to attack the jurisdiction of the Court which had enjoined the circularization, as the terms of the injunction order, if within the jurisdiction of the Court to make, had, of course, to be obeyed. This Court says, at page 436:

> "We will not enter upon a discussion of the constitutional question raised, for the general provisions of the injunction did not, in terms, restrain any form of publication. The defendants' attack on this part of the injunction raises no question as to an abridgement of free speech, but involves the power of a court of equity to enjoin the defendants from continuing a boycott, which, by words and signals, printed or spoken, caused or threatened irreparable damage.
>
> Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a

conspiracy causing irreparable damage to the business or property of the complainant. Some hold that a boycott against the complainant, by a combination of persons not immediately connected with him in business, can be restrained. Others hold that the secondary boycott can be enjoined, where the conspiracy extends not only to injuring the complainant, but secondarily coerces or attempts to coerce his customers to refrain from dealing with him by threats that unless they do they themselves will be boycotted. Others hold that no boycott can be enjoined unless there are acts of physical violence, or intimidation caused by threats of physical violence.

But whatever the requirement of the particular jurisdiction, as to the conditions on which the injunction against a boycott may issue; when these facts exist, the strong current of authority is that the publication and use of letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued, and their use for such purpose may amount to a violation of the order of injunction."

Here again the Court expressly refuses to hold that what might be called a primary boycott, unaccompanied by threats or compulsion, would be in itself unlawful.

In *Grenada Lumber Company* vs. *Mississippi*, 217 U. S., 433, the Mississippi Statute against restraint of trade came before this Court upon the theory that it was in conflict with the Fourteenth amendment. It was here held that the Statute was within the Police power of the State to enact. The Grenada Lumber Company was in a combination that admittedly had agreed amongst themselves not to deal with any producer or wholesaler who should sell to a consumer within the

trade range of any of them. But of this combination all that this Court says (p. 441), is :

> " Whether it would be an illegal restraint at common law is not now for our determination. It is an illegal combination and conspiracy under the Mississippi Statute. That is enough if the Statute does not infringe the Fourteenth amendment."

If this Court had reversed the decisions of the Mississippi Courts in construing this Mississippi Statute it would have had to have held that the Mississippi Courts had failed to apply the standard of reason to their own Statute—*and* that in that failure they had so construed their own Statute as to render it *ipso facto* by their construction, unconstitutional. That is a question very far apart from the question in a case which is to be decided, not by the terms of the Mississippi Statute, but by the terms of the Sherman Act as construed by the Supreme Court.

This distinction is interestingly developed in another case which the Government cited at considerable length below, *State* vs. *Adams Lumber Co.*, 81 Neb., 392. At pages 412 and 413 of its opinion the Nebraska State Court takes the definite position, (and of course now indefensible position), that the Sherman Act did *not* have to be read in the light of reason, and then comments upon the fact that the Nebraska Statute is almost a literal transcript of the Sherman Act. Only through reading the Nebraska Statute *not* in the light of reason does the Nebraska Court reach its conclusions, because it says at page 418 of the opinion :

> " We are inclined to agree with the attorneys for

the defendants that, unless the case falls within the language of the Statute, no unlawful act has been committed, and the cases cited in their brief, considered aside from the Statute, would be in point."

After all, has the rule as to what is an illegal boycott changed greatly from that laid down by Judge Taft in 1893 in *Toledo, Ann Arbor & North Michigan Railway Co.* vs. *Pennsylvania Co. et al.*, 54 Fed. Rep., 730, where he said:

"As usually understood, a boycott is a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them. Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do that which the combiners seek to compel them to do."

IV.

The evidence concerning past occurrences, if of any materiality at all, tends to establish that the defendants' present intent is right and law abiding.

The opening paragraph of the opinion of Judge Lacombe concludes with a sentence that might suggest a view on the part of the Court below as if the intent of

the defendants had been wrongful from the first, and these lists were merely a continuance of old misdeeds in a new form. With this we respectfully take issue. The testimony in this case, heretofore referred to in our Statement (p. 6, of this brief), demonstrates that all questionable acts had been abandoned before this action was brought or thought of, except the circulation of the lists that is the subject of the present discussion. It does not appear that the lists are a substitute in another form for older methods which have been given up. It is simply that the older methods have been given up, and the lists remain. We respectfully insist that the most reasonable inference from this is that of an effort on the part of these defendants to abandon that which might be questionable and to keep to only that which was lawful. We cannot shut our eyes to the fact that the views of the Courts have progressed in reference to the scope of Anti-Trust acts with unexampled rapidity, and that the Bar and clients have had to be active in order to keep on with them. Nor can it be gainsaid that there has been a tendency on the part of lawyers, which has vastly increased in the last five years, towards advising clients to err on the safe side in regard to the Sherman Act. If certain methods are abandoned and others are continued, the presumption, certainly in such an instance as this, is that the change of method has been from an honest desire on the part of both lawyer and client to see that the latter *observes* the law. This presumption, in the instance of the Philadelphia Association, is notably borne out by such unconscious testimony as appears in a letter of Mr. Maule,

the Secretary of the Association, written in the year 1908, long prior to the institution of this action or to any suggestion of it, where he says :

> " In regard to the classifications would say when this Association abrogated the ' Boston Agreement,' they also abrogated all classification. Some of the wholesale lumber dealers, it seems, are not awakened to that fact " (Vol. X, p. 283).

This letter could not have been written at that time for the purpose of making evidence. It was written because the leaders in the Philadelphia Association desired, in spirit as well as in law, to give up anything that might be questioned and to keep only to that which was lawful.

This Philadelphia Association was formed in December, 1903 (Vol. X, pp. 228-229). There had been prior Associations of retail lumber dealers in Philadelphia ; but so far as appears the only person connected with the present defendant Association, who had also been connected with the prior Associations, was Mr. Maule. Mr. MacBride, its President, came into the present Association subsequent to its formation (p. 257) ; so likewise the defendant, Mr. Chesnut (p. 269), one of its leading members. The circumstances surrounding its birth show that its inspiration was a desire on the part of its organizers to do that which was lawful. Counsel were called in. The proposed declaration of purposes and articles of association of the new Association were submitted to them, as well as the by-laws of the Eastern States Retail Lumber Dealers Association, which had then been in existence but a few months

(see pp. 228-229). The Philadelphia Association was told by counsel that these documents portrayed a legal project, and that if the members of the Association lived up to them, they would be doing that which was according to law. The Boston agreement, for instance, concerning which much was said in the Government's brief, was made and abrogated before the present Philadelphia Association was formed. Undoubtedly, when the changing sentiment of the times showed such an agreement to be questionable, the Philadelphia retail lumbermen wished to get away from it and like practices, and for that reason started their new Association.

We invite attention to its declaration of purposes and articles of association (see Vol. IV, p. 362). To them the Philadelphia Association has certainly lived up. It has facilitated the distribution of information, its intention so to do being distinctly apparent on the face of its organic papers. And it has also had numerous other lines of activities, none of which have been the subject of criticism. They are typified in the extracts from the minutes of the meetings of the Association appearing at pages 284-289 of Volume X of the record. These cover all kinds of matters coming up in regard to the trade : matters benevolent, such as extending help to one of their members burned out ; matters protective, such as their relations with the Fire Department of the City ; matters practical, such as arranging for uniformity in building specifications ; matters, it would seem, artistic, such as efforts to stop advertisement on railroad cars. The activities were of all sort, and as such showed an association formed in good faith for the im-

provement and development of the mutual trade of its members. It has a membership of forty retail lumber dealers, paying annual dues of $10 apiece, creating an annual fund for the Association's expenses of about $400 (Vol. X, p. 236)—that is, until it had to bear the expense of this litigation.

The Eastern States Retail Lumber Dealers' Association, which was chartered about a year before the Philadelphia Association, and whose By-Laws were adopted in February, 1903 (Vol. IV, pp. 31-38), seems also to have been born of the desire to do that which was lawful and to give up that which was questionable. Probably up to that time its component parts had been going along without counsel and without accurate knowledge of what the law was. At that moment counsel was called in, we believe the same learned and eminent counsel who now represents a large body of the defendants in this case; and that counsel, it must be presumed, undertook to inform his clients of that which was legal, just as in the instance of the Philadelphia Association the Philadelphia counsel had undertaken to inform his clients as to what was legal. When the General Association undertook to state certain objects which might be deemed questionable (p. 31), counsel's views were asked and the result was that no such objects were included in the objects of the Association. Its Charter was directly pursuant to the Statute of the State of New York which we quoted at page 7 of our brief.

We submit that if the evidence of the past has any relevancy whatever, it is to sanction an inference

that the efforts of the defendants for the last ten years have been to do what was right, and that their abandonment of questionable methods shows an intent *not* to trangress the enactments of the Sherman Law.

V.

These present appellants are not responsible for the actions of individuals in other local associations.

The evidence does not disclose a confederation of any sort direct between the various local Associations except in the matter of exchange of information through their Secretaries with reference to persons who should or should not be placed upon the official lists. There is no testimony tending directly or circumstantially to show, for instance, that the Philadelphia Association, or any of its members, knew what action was being taken by members of the New Jersey Association with reference to wholesalers who sell direct to consumers. There is the same lack of evidence of any agreement between the Associations as to what should be done with reference to such wholesalers, as there is a lack of evidence of any such agreement between the members of the Philadelphia Association itself. The Government would, however, fasten upon the Philadelphia Association a responsibility for actions of individuals in other Associations by reason of their mutual connection with the Eastern States Association. Regarding that, we have heretofore commented upon the fact that the By-Laws

of the Eastern States Association were submitted to counsel for the Philadelphia Association when the latter were invited to send delegates to the former, and in our last point we endeavored to make it clear that the Charter and By-laws of the Eastern States Association exhibited an entirely legal purpose. In Article IV of their By-Laws (Vol. IV, p. 36), it is expressly provided that no officer should have any power to enter into any agreement on behalf of the Association until it should have received the approval of the majority of the membership. The powers of such an Association are, under the New York Statute, exercised only either at one of the meettings of the Association or by express delegation to an official. The plan of a membership non-stock corporation of the State of New York is much like that of Town Government in the New England States. The affairs of the Association are largely regulated at a meeting thereof, which is analogous to a Town meeting, and there cannot be imputed to members of the Association an intent to delegate, by implication, matters to its officials which are not expressly delegated to them at one of these meetings. There is no testimony, direct or circumstantial, to the contrary of what Mr. Maule and Mr. MacBride testified (Vol. X, pp. 236, 237, 261), that they never knew of, nor undertook to link the Philadelphia Association with, any scheme for establishment of trade prices or any coercive practices or boycotting practices.

There might be room for argument as to whether the members of the Eastern States Retail Lumber Dealers'

Association were responsible for actions on the part of its officers within the scope of its Charter and By-Laws although those actions did not come to the personal knowledge of other members of the Association; but it would be an extension of the doctrine of responsibility in criminal conspiracy far beyond any lengths to which it has already been carried, to say that membership in that Association imposed a duty upon each member to see to it that none of the other members engaged in coercive, boycotting or other practices claimed to be in restraint of trade, when the conduct or misconduct of its members in that regard was beyond the scope and purview of its By-Laws. Certainly an agreement in any local Association to restrain trade, or coercive measures in any Association in restraint of trade, might have existed—we do not for a moment admit that any such did exist—but we say might have existed, equally in the absence of these official lists as on account of them. The Secretary of one of the local Associations pursued a course which has been especially animadverted upon by counsel for the Government; but this course, as we read the testimony, was in consequence of information which he had received about certain people from individual members of his own Association. He caused these people both to be put upon the lists, and also, in certain instances, may have taken other measures in regard thereto. Those measures he would have taken whether the people were on the lists or not. Suppose, however, he had pursued some coercive course in consequence of the receipt of information which he gathered from the lists. Could a

newspaper publication be deemed a party to a conspiracy because Smith had read in the newspaper that Brown was engaged in trade practices of which Smith did not approve, and thereupon Smith had gone among his friends and banded them together to subvert Brown's trade? Probably all conspiracies follow from receiving information, but that is far from making the informant a party to the conspiracy.

There have been several recent cases pertinent to the matters discussed in this particular point.

In *State* vs. *Adams Lumber Co.*, 81 Neb., 392, much relied upon by the Government below, there was found by the Court as existing an agreement on the part of the retailer's association not to buy from wholesalers who sold direct to consumers. It was claimed by the State that certain of the retailers, members of the Nebraska Lumber Dealers' Association, had been guilty of various especial illegal practices and that the other members of the Association were responsible for what had been thus done and were the subject of condemnation on that account. This contention was overruled by the Court in the following language (p. 423 of the Opinion):

> "The Attorney-General argues that 'each member of a conspiracy to restrict trade is answerable for all the acts and declarations of every other member in furtherance of a common design, and the evidence that the defendants fixed prices and divided territory is conclusive,' citing *Farley* vs. *Peebles*, 50 Neb., 723; *Chicago, R. I. & P. R. Co.* vs. *Collins*, 56 Ill., 212; *Commonwealth* vs. *Waterman*, 122 Mass., 43, and urges that these instances prove the larger combination.

If the acts of the defendants in the several counties mentioned had been a part of a general plan, conspiracy or combination to fix prices or divide territory covering the whole state, then the principles he invokes would apply, but we do not think the evidence justifies such a conclusion. We think it shows that these instances were sporadic in their nature, and each local combination or attempted combination was no part of a general plan. Construing the facts disclosed by this testimony as to local combinations in the several counties, we are satisfied that the proof fails to establish that the Nebraska Lumber Dealers' Association, as an association, attempted to fix prices or divide profit, or that it prescribed any price list or sale by which its members should regulate the cost to the consumer of the various articles in which they dealt, or that it prescribed territorial limits in which sales should be made by its members. Wherever such agreements have been shown to exist the defendants who participated in them are justly subject to the restraining power of the court to prevent their continuance of such unlawful practices, regardless of the fact whether they are members of the association or not.

We think the association is not to be held accountable for isolated acts or local agreements entered into between dealers, some of whom were members and some of whom were not members, any more than the organization of a church is to be held responsible for intolerant, oppressive or fraudulent acts indulged in by certain of its members, and, if the only evidence affecting the association were that produced upon this branch of the case, we would be compelled to sustain the conclusions of the referee."

In *Lawlor* vs. *Loewe*, 187 Fed. Rep., 522, the Danbury Hatters' case was again before the Courts on writ of error from the judgment entered upon the trial that

took place after the demurrer had been overruled in this Court. The verdict and judgment were reversed, among other reasons for failure to observe the following obvious principles. We quote from the opinion of the Circuit Court of Appeals, written by Judge Lacombe (p. 526):

> "It has been argued here that the mere fact that any individual defendant was a member of and contributed money to the treasury of the United Hatters' Association made him the principal of any and all agents who might be employed by its officers in carrying out the objects of the association, and responsible as principal if such agents used illegal methods or caused illegal methods to be used in undertaking to carry out those objects. We cannot assent to this proposition. The clause of the constitution of the United Hatters which provides that certain of its officers 'shall use all the means in their power to bring such shops (*i. e.*, non-union shops) into the trade' does not necessarily imply that these officers shall use other than lawful means to accomplish such object. Surely the fact that an individual joins an association having such a clause in its constitution cannot be taken as expressing assent by him to the perpetration of arson or murder. Something more must be shown, as, for instance, that with the knowledge of the members unlawful means had been so frequently used with the express or tacit approval of the association, that its agents were warranted in assuming that they might use such unlawful means in the future, that the association and its individual members would approve or tolerate such use whenever the end sought to be obtained might be best obtained thereby."

Finally, we call attention in this connection to the de-

cision of this Court in *U. S.* vs. *Reading Co.*, 226 U, S., 324. The Court concludes that the proof falls short of showing any general combination on the part of the Anthracite Coal Companies, defendants in that case. It then holds that there were two particular combinations, special in their scope though general as to all of the defendants, the continuance of which combinations the Court enjoins. It then speaks of certain combinations charged in the bill *which are not general to all of the defendants.* Concerning them, the ruling of this Court is as follows (p. 372):

> "These were all minor combinations in which only some of the defendants participated. The accomplishment of these several subordinate transactions only completed one or another of the several groups of carriers and coal-producing companies, which several groups were thereafter not only possessed of the power to compete with every other group, but, as we have already seen, were actually engaged in competing, one with another, prior to the general combination through the Temple Iron Company and the sixty-five per cent. contract scheme.
>
> "So far as this record shows not one of these transactions was the result of any general combination between all of the defendants and constituted no part of any such general combination. None of the defendants had any part or lot in bringing them about except the particular combining companies.
>
> It is true that the bill asks injunctions against the continuance of each of these minor combinations. But if, as we conclude, they did not constitute any part of any general plan or combination entered into by all of the carrier companies, their separate consideration as independent violations of the Act of Congress is not admissible under the general frame

of this bill. To treat the bill as one seeking to apply the prohibition of the Act of Congress to each one of these independent combinations would concondemn the pleading as a plain misjoinder of parties and of causes of suit, and a plain confession of multifariousness. All of the defendants had a common interest in the defense of the Temple Iron Company combination, and that of the sixty-five per cent. contracts, because it was alleged that all had joined therein. But all of the defendants did not have a common interest in the defense of these three minor combinations, unless it appear that they were, as charged, 'steps,' or acts and agreements in furtherance of the general combinaation to which they were all parties. This we find not to be the fact. If, therefore, we shall treat the bill as broad enough to involve combinations which were not steps or acts in furtherance of any general combination, we shall overrule the objection of multifariousness made below and here, for we shall then maintain a bill setting up three separate and distinct causes of action against the distinct groups of defendants, one having no interest in or connection with the other. The grounds of each suit would be different and the parties defending different. See the discussion and cases cited in Simpkins' Federal Equity Suit, pp. 290 *et seq.*

Having failed to show that these minor combinations were acts in furtherance of the general scheme, or the acts of the combiners in the two combinations condemned, we are asked to deal with them as separate illegal combinations by such of the defendants as participated. This the court below declined to do, and we in this find no error.

As to the legality of the minor combinations, we therefore express no opinion. We affirm the action of the court below in declining to enjoin them, because to construe the bill as directed against them as

independent combinations, between some but not all of the principal defendants, would make the pleading objectionably multifarious. We therefore direct that the bill be dismissed, without prejudice, in so far as it seeks relief against the three alleged minor combinations."

VI.

In Conclusion.

In *Central Lumber Co.* vs. *State of So. Dakota*, 226 U. S., 157, this Court held to be constitutional the familiar "one price" State Statutes which provide that there must be no discrimination in prices in different localities in a State so as to charge more where there are no competitors, or strong ones, and less where there are weak ones. The States enacting these statutes, have, it seems, developed the latest trade theory,—that kid glove competition is the present desideratum. It was said in the *Freight Association* case: "In the fierce heat of competition the stronger competitor may crush out the weaker." But now some of our fellow citizens insist that no such class of combat should be countenanced. Just how far some of these State Statutes may eventually go in a paternalistic effort to regulate all business it is not necessary for us to inquire, nor to what absurdities and incongruities they will all lead. There were no absurdities contemplated by the Sherman Act; this Supreme Court has firmly taken that position; and that ought to settle this case. For it does come dangerously near to an ab-

surdity that any Court should hold that while all men have a right freely to receive information and to know the habits and customs of those with whom they do or may deal, yet it is not their right, even without malice, to combine into an association in order the better to acquire that knowledge. We respectfully contend that the Sherman Act is not an omnibus lever to regulate all business throughout this country according to whatever views happen to prevail ; nor is it a means by which the protection of liberty of action and of property that is guaranteed of Congress to the people of the United States by the Fifth Amendment to the National Constitution, may be set at naught.

VII.

The decree below should be reversed and the bill of the Government dismissed.

Respectfully submitted,

CHARLES E. MORGAN,
HOWARD TAYLOR,
C. E. MORGAN, 3d.,
CHARLES B. BROPHY,
Of Counsel for the Philadelphia Retail Lumbermen's Association.

No. 550.

FILED
OCT 31 1913

[Add to page 69 of Appellant's Brief in No. 550.]

(1.) Extensive exchange of business information among manufacturers and dealers in the different trades and industries throughout this country has become very frequent since the recent decisions of the Supreme Court under the Sherman Act. This exchange of information may go to a disclosure of the character of a trader's business as in the case at bar; or to the prices that a trader or manufacturer is realizing on sales; or to the cost of a manufacturer's production. In the vast majority of such present instances the business men and business associations, intended to be law-abiding and to meet the views of the Supreme Court regarding the Sherman Act, do not follow out the receipt of such information by any combination whatever affecting prices or any other element in their trade. There are many objects in thus exchanging information, one of which, we might concede, may be to have competition conducted intelligently and with stability, and to lessen sporadic competition, competition that ought not in reason to be expected, competition that the trade would consider unfair or piratical, competition which, to use the phrase in the *American Tobacco Company* case (p. 177 of The Reporter, 221 U. S.), might mean "a flagrant and ruinous trade war."

We submit with all such earnestness as we can command that these methods in business are commendable. They ought to commend themselves to the Department of Justice, just as well as to lawyers who are seeking to give correct and fairminded advice to business clients as to what is lawful. These methods should not be

received as if they were covers and subtleties to conceal infractions of the Sherman Act. If in particular cases there result from this exchange of information combinations which do infringe the Sherman Act, then it is *those* combinations that should be corrected. In other words, this method of business should not be touched, but only the abuses that may arise therefrom in particular instances.

(2.) It is easy to illustrate where the lists involved in this case have different uses for one recipient than for another. In one instance a retailer who knows just where he can place a particular shipment of lumber will buy it from a dealer on the lists, because in that instance he is not fearful of the dealer's going over his head to sell to his own customer. In another instance where the retailer will be buying for his general yard stock, he might be more chary of making purchases from persons on the list. In a third instance, the information received may be mere information to the retailer of the character of the man that he is, or may be, dealing with. It has both great and also varied practical value. But if it had no practical value at all, and if its value lay only in the imagination of a retailer, nevertheless if that is the method that has always obtained in his business and trade, it surely savors of intrusive paternalism for the Government to interfere.

(3.) The opinion below is the first instance, so far as we are aware, either in connection with a combination of traders or a combination of working men, where the mere distribution of a circular has of itself been held illegal. Such advance on the part of the Courts in the

instance of traders, necessarily presages the like advance in the instance of labor unions. But such extensions of doctrine must prove the strongest possible influence toward those enactments which are the most to be deprecated—class legislation. Witness the fact that, at about the time when the opinion below was promulgated, labor unions and farmers associations became most insistent that no money should be appropriated by Congress for their prosecution under the Sherman Act.

(4.) There is no fear or dislike in the lumber trade for the main association in this case, or for any of the local associations, or for the power of these associations, as such. The apprehensions of a wholesaler who is secretly doing a retail business springs only from the increased chance of *publicity* of his doings. In other words, the question before the Court is not of the scope of the associations, but the scope of these circulars.

(5.) In regard to the Government's additional citation of references to the record relating to the supposed declaration of principles of the defendant the Eastern States Retail Lumber Dealers' Association, we call the Court's attention to the date when its by-laws were adopted, and it became a going body (Vol. IV, Record, p. 35), and to the fact that no such declaration of principles appears, or is referred to, in either its charter (bottom of p. 33) or by-laws (p. 35); and we call further attention to the date when the Philadelphia Association was formed (Vol. IV, Record, p. 362), and the fact that no such declaration of principles appears either in its declaration of purposes or articles of association.